Supreme Court, U.S.
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No. 91-1496

In The

Supreme Court of the United States

October Term, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,

Debtor

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the filed rate doctrine mandates that a shipper must pay the full tariff rate to a bankrupt carrier in a rate undercharge collection before the matter may be referred to the Interstate Commerce Commission (hereinafter "ICC" or "Commission") for a determination of the reasonableness of those rates.

PARTIES TO THE PROCEEDING

Petitioner, Peter C. Reiter, a broker of motor carrier transportation licensed by the ICC.

Petitioner, California Consolidated Enterprises, Inc., a broker of motor carrier transportation licensed by the ICC.

Respondent, Langdon M. Cooper, the Trustee for the Estate in Bankruptcy of Carolina Motor Express, Inc., a motor common carrier regulated under the Interstate Commerce Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND JUDGMENTS BELOW 1

GROUND FOR JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 7

ARGUMENT:

A. The Decision of the Fourth Circuit Conflicts with Decisions of This Court 7

B. The Decision of the Fourth Circuit is in Conflict with All Other Courts of Appeal that Have Addressed This Subject 13

C. The Fifth Circuit Ruling that the Fourth Circuit Relied Upon Has Now Been Overruled 14

D. The Dissent in Case Below Correctly Expressed the Law 17

E. The Procedure Mandated by the Court of Appeals "Stands the Matter on its Head" 18

CONCLUSION 24

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Advance United Exp. v. Eastman Kodak Co., No.91-1320, slip op. (5th Cir., June 26, 1992) ...13, 15

Atlantis Exp., Inc. v. Standard Transp. Serv., 955 F.2d 529 (8th Cir. 1992) 14, 21

Crancer v. Lowden, 315 U.S. 631 (1942) 10

Delta Traffic Serv., Inc. et al v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990) 10, 13

Duffy v. BMC Indus., Inc., 938 F.2d 353 (2d Cir. 1991) 13

Ex Parte No. MC-177 (Sub-No. 2) Petitions for Issuance for Rate Reasonableness and Unreasonable Practices Policy Statement, 8 I.C.C.2d 61 ..... 20, 21

General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 442 (1940) 9

Glama Dress Co. v. Mid-South Transports, 335 I.C.C. 586 (1969) 19

Great Northern Ry. Co. v. Merchants Elev., 259 U.S. 285 (1922) 9

In re Caravan Express, 864 F.2d 388 (5th Cir. 1989) cert. den. 110 S.Ct. 3254 (1990) 15

Informal Procedure for Determining Reparations, 335 I.C.C. 403 (1969) 19

Lloyd T. Whitaker, Chapter 7 Trustee for Olympia Holding Corp. v. Younkers, Inc., U.S. Bkr. Court for the Middle District of Florida, Adv. No. 91-448, decision denying referral dated June 15, 1992 21

TABLE OF AUTHORITIES – Continued

Page

Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759 (1990) 6, 7, 15, 17

Mammoth Plastics v. National Classification Bd., 341 I.C.C. 15 (1972) 18

Mill Truck Lines, Inc. v. Makita U.S.A., No. 91-55059 (9th Cir., June 7, 1992) 14

O.C. Field Gasoline Corp. v. Nevada N. Ry. Co., 258 I.C.C. 350 (1944) 23

Orr v. ICC, 912 F.2d 119 (6th Cir. 1990) 13

Orscheln Bros. Truck Lines, Inc. v. Zenith Elec. Corp., 899 F.2d 642 (7th Cir. 1990) 13

Passenger Fares, District of Columbia, Nearby Virginia, 256 I.C.C. 769 (1944), mod., 280 I.C.C. 37 (1951), aff'd sub nom., United States v. Capital Transit Co., 325 U.S. 357 (1945) 22

Penick & Ford v. Director General, 80 I.C.C. 152 (1923) 22, 23

Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913) 9

Pennsylvania R. Co. v. United States, 363 U.S. 202 (1956) 7

Richmond Mica Corp. v. Atlantic Coast Line R. Co., 167 I.C.C. 647 (1930) 23

Southern Cement Rates, 132 I.C.C. 427 (1927) 23

Southern Pac. Transp. Co. v. City of San Antonio, 748 F.2d 266 (5th Cir. 1989), cert. den. 110 S.Ct. 3254 (1990) 8

TABLE OF AUTHORITIES – Continued

Page

Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388 (5th Cir. 1989), cert. denied 493 U.S. 803 ..... 15, 17, 18

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 9

United States v. Western Pac. R. Co., 352 U.S. 59 (1956) 7, 9

West Coast Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d 1016 (9th Cir. 1990) 14

Western Trans. Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982) 13

STATUTES

49 U.S.C. § 10701(a) 2, 22

49 U.S.C. § 10701(e) 3

49 U.S.C. § 10761(a) 1

49 U.S.C. § 10762(a)(1) 2

49 U.S.C. § 11705(b)(3) 4, 18

49 U.S.C. § 11706(c)(2) 4, 18

PUBLICATIONS

"High Court Grants Cert," Traffic World 18 (May 25, 1992) 12

Harper, Transportation in America, 2d ed. 176 (1982) 22

CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The decision of the Court of Appeals is *In Re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991).

The District Court decisions were not recommended for full text publication. They were printed as *Cooper v. California Consolidated Enterprises, Inc.*, 1989 Federal Carriers Cases at 83,464 and *Cooper v. Peter C. Reiter*, 1989 Federal Carriers Cases at 83,465.

The decision of the bankruptcy court is *Cooper v. California Consolidated Enterprises*, 84 Bankr. 979 (Bankr. W.D.N.C. 1988).

GROUND FOR JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(10), Title 28 of the United States Code. The decision of the Court of Appeals was entered on November 7, 1991. No petitions for rehearing were filed.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the

rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. § 10762(a)(1) provides:

A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides that:

A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

Section 10701(e) of the Interstate Commerce Act, 49 U.S.C. § 10701(e) provides that:

In proceedings to determine the reasonableness of rate levels for a motor carrier or group of motor carriers, or in proceedings to determine the reasonableness of a territorial rate structure where rates are proposed through agreements authorized by section 10706(b) of this title, the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expense, including the operation of leased equipment and depreciation, plus a reasonable profit. The standards and procedures adopted by the Commission under this subsection shall allow the carriers to achieve revenue levels that will provide a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of reasonable level of debt, permit the rasing of needed equity capital, attract and retain capital in amounts adequate to provide a sound motor carrier transportation system in the United States, and take into account reasonable estimated or foreseeable future costs.

Section 11706(c)(2) of the Interstate Commerce Act, 49 U.S.C. § 11706(c)(2) provides that:

> A person must bring a civil action to recover damages under section 11705(b)(3) of this title [49 U.S.C. § 11705(b)(3)] within 2 years after the claim accrues.

STATEMENT OF THE CASE

In December 1986 Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc. (hereinafter referred to as Trustee, Carolina, Mark respectively or collectively as Respondents), commenced this bankruptcy action in the United States District Court for the Western District of North Carolina, Shelby Division, against Carolina Consolidated Enterprises, Inc. (hereinafter referred to as CCE or Petitioner) (J.A. 14) and in January 1987 commenced another, related action in the same court against Peter C. Reiter (hereinafter referred to as Reiter or Petitioner) (J.A. 20). The Respondents sought to recover alleged undercharges based on tariffs on file with the ICC. See *Cooper v. California Consolidated Enterprises*, 84 Bankr. 979 (Bankr.W.D.N.C. 1988).

Reiter and CCE asserted various affirmative defenses, including allegations that Carolina was charging an improper rate, and denied that any additional amount was due and owing in connection with the transportation services Carolina provided. (J.A. 26 & 31). In March 1987 Reiter and CCE filed a Motion for Referral to the ICC with a supporting Memorandum arguing that the

question of the reasonableness and lawfulness of the rates involved in this proceeding should be referred to the ICC. (J.A. 36). Respondents filed a Memorandum of Law in Opposition, arguing that the questions of the reasonableness and lawfulness of the rate and unreasonable practice should not be referred to the ICC. (J.A. 41 & 56).

By Order dated March 25, 1987, Judge Marvin R. Wooten denied Reiter's and CCE's Motions for Referral. The parties conducted discovery and went to trial based on stipulated facts. Final judgments were entered on March 17, 1988, in favor of Respondents in connection with the undercharge claims in the principal amount of $13,795.73 and against CCE in the principal amount of $58,793.03. See *Cooper v. California Consolidated Enterprises, Inc.*, 1989 Federal Carriers Cases (CCH) at 83,464, and *Cooper v. Peter C. Reiter*, 1989 Federal Carriers Cases (CCH) at 83,465.

In March 1988 Reiter and CCE filed Notices of Appeal to the District Court concerning the Bankruptcy Court's judgments of March 17, 1988. Respondents memorialized their appeal of portions of the Bankruptcy Court's final judgements in their Notices of Cross-Appeal filed on or about April 7, 1988. Respondents appealed those portions of Judge Wooten's decisions denying prejudgment interest.

On April 25, 1989, Judge Jones entered Orders reversing the final Judgements of the Bankruptcy Court and referring to the ICC the issue whether the collection of the undercharges in these cases was an *"unreasonable practice."* Judge Jones also ordered that all proceedings be stayed pending the decisions of the ICC. Respondents filed Notices of Appeal to the United States Court of Appeals

for the Fourth Circuit on May 4, 1989. Reiter and CCE filed their complaints with the ICC on May 16, 1989.

By decisions handed down on March 7, 1990, the ICC upheld CCE's and Reiter's unreasonable practices defenses to the imposition of the filed rates. See *California Consolidated Enterprises, Inc. v. Carolina Motor Express, Inc.*, No. MC-C30166, and *Peter C. Reiter v. Carolina Motor Express, Inc.*, No. MC-C-301067. The ICC's decisions preceded this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990), which eliminated the unreasonable practice defense. CCE's and Reiter's cases were consolidated by Order of the Fourth Circuit on June 9, 1989.

After this Court handed down *Maislin, supra*, all parties filed letter briefs. (J.A. 59 & 65). Petitioners reasserted before the Fourth Circuit the issue of rate reasonableness, and requested that the proceedings be re-referred to the ICC for a determination of the rate reasonableness.

In decisions entered on November 7, 1991, the Fourth Circuit held that the Petitioners were required to pay the amount of the filed rate into the general funds of the bankruptcy estate before being allowed to refer the matter to the ICC for a determination whether the rates were reasonable and therefore lawful. The Court did conclude the issue of rate reasonableness had been preserved. See *In Re Carolina Motor Exp., Inc.*, 949 F.2d 107, 114 (4th Cir. 1991). Judge Hall, in a dissent, at 112, 114 held that the rate reasonableness issue should be re-referred to the ICC

upon a showing that its rate claims were "more than a bold, conclusory allegation of rate unreasonableness." *Id.*, at 114.

SUMMARY OF ARGUMENT

Petitioners have a right to have the issue of reasonableness of the rates referred to and determined by the ICC. If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy.

Respondents are bankrupt. If Petitioners win before the ICC, their standing is that of mere unsecured creditors.

ARGUMENT

A. The Decision of the Fourth Circuit Conflicts With Decisions of This Court.

This Court unequivocally declared that the shipper in a negotiated rates case was entitled to have the reasonableness of the rates sought to be collected, *Maislin, supra*, 110 S.Ct. at 2767, in the context of the carriers undercharge collection action. This declaration followed a long line of cases in which this Court had allowed the shipper to assert the unreasonableness of the filed rates as a defense against the collection of that rate. See *United States v. Western Pac. R. Co.*, 352 U.S. 59, 75 n.18 (1956) and *Pennsylvania R. Co. v. United States*, 363 U.S. 202, 203

(1913). A necessary corollary to that right is that, if the rates are found to be unreasonable, that finding will operate as a defense to the payment of the charges. If this were not a corollary, the reasonableness of the rates would be irrelevant, because the shipper would be required to pay the tariff rate, regardless of whether it was reasonable or not. As the carrier, in that case as well as in the instant proceeding, was in bankruptcy, a finding that the rate was unreasonable would only be of any effect if the shipper could assert it prior to paying the full tariff rate to the bankruptcy estate. As a mere unsecured creditor, the shipper could not reasonably expect any return from the bankruptcy estate if the rate collected were later determined to be unreasonable.

The Fourth Circuit has overlooked a significant condition for prepayment set forth in the Fifth Circuit's decision in *Southern Pac. Transp. Co. v. City of San Antonio*, 748 F.2d 266 (5th Cir. 1989), cert. den. 110 S.Ct. 3254 (1990). In *San Antonio*, the court held that the "carrier must be prepared to reimburse amounts later found to be unreasonable." *Id.*, at 274. Obviously the effectiveness of a subsequent reparations remedy is a condition precedent to requiring payment. Requiring a shipper to pay the amounts claimed to be due a defunct carrier where there is little or no prospect that a subsequent order of reparations will provide any effective remedy is absurd. The auditor/collection agency routinely retains about 70% of the amount collected off the top and the remaining 30% is dissipated before a reparations order becomes effective.

This result is proscribed by this Court's decisions[1] in *Western Pac., supra*, and *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 442 (1940).

Western Pac., supra, involved a dispute over (1) whether a tariff required a shipper to pay a specific rate, and (2) if the tariff required the payment of that rate, which was higher than the rate the shipper thought was applicable, whether the higher rate was "reasonable" as applied to the shipment. This Court held that the district court should not have found for either the shipper or carrier until the ICC determined both questions. *Western Pac.*, 552 U.S. 62-70, *Great Northern Ry. Co. v. Merchants Elev.*, 259 U.S. 285 at 291-292 (1922). See also *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 435-48 (1907).

Respondents in their Brief in Opposition to the Petition for Writ of Certiorari argue that, "The referring circuits have created a fiction which is not supported by the statute or Supreme Court law in an effort to bend over backwards to find relief for shippers presented with undercharge claims made by bankrupt carriers. It is important to note that when a carrier seeks to collect its filed tariff rate, neither the statute nor case law makes a distinction as to whether or not the carrier is solvent." (R. 12) Respondents then cite *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913). But there the court specifically noted that "the carrier [is] to retain what had been paid," *Id.* at 197, but here the "carrier" will retain nothing, and Petitioners will recover nothing

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[1] The Court has long held that "[w]henver a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission". *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

back from the bankruptcy estate, if the rates are found to be unreasonable.

Similarly, Respondents relied on *Crancer v. Lowden*, 315 U.S. 631, 636 (1942), which says that "if petitioner pays the judgment in this case and the Commission should in the still pending proceeding decide to modify the tariffs, *petitioner can obtain a complete remedy by way of reparation* (emphasis supplied).

That is not the case here. Respondents will admit and the Fourth Circuit acknowledged that if these "undercharges" are collected on the basis of the filed rate, and if the Commission, after referral, determines that the rate is unreasonable the Petitioners will get little or nothing back.

In *Delta Traffic Serv., Inc. et al. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), Judge Steven G. Breyer comprehensively set forth why the court should stay the matter and refer it to the ICC when the reasonableness of the filed rate is at issue:

> As *Western Pacific* itself makes clear, where the "reasonableness" of the filed rate is at issue in a carrier's rate-collection suit, the court should refer the matter to the ICC and apply the ICC's result. Although the Supreme Court has also said, in strong terms, that a shipper *must* pay the filed rate, its cases are not in conflict on this point. In *Maxwell* [237 U.S. 96], where the Supreme Court announced the "filed rate doctrine" in absolute-sounding language ("Deviation [from the filed rate] is not permitted upon any pretext"), it followed that language with the sentence:

> Shippers and travelers are charged with notice of [the filed rate], and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*

Maxwell, 237 U.S. at 97 (emphasis added). Seventeen years later, the Court explained that a carrier must charge the filed rate (which the Court called the "legal" rate) to "all shippers alike," but that the "legal" rate was not necessarily "lawful," *Arizona Grocery Co. v. Atchison, T & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932). A rate is "lawful," said the Court, only if it is "reasonable." *Id.* And a shipper may recover the difference between a high, filed ("legal") rate and a lower reasonable ("lawful") rate by bringing a suit against the carrier for reparations. *Id.*; *accord Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *cf.* 49 U.S.C. § 11705(b)(3) (creating cause of action for reparation) (original version at 49 U.S.C. § 304a(2) [repealed 1978]).

Because shippers may assert the unreasonableness of a rate as grounds for recovery in a reparation suit, courts ordinarily have permitted shippers to assert the same ground in a *defense* in a *carrier's suit* to collect the filed ("legal") rate. *See, e.g., Western Pacific, supra; United States v. Chesapeake & Ohio Ry. Co.*, 352 U.S. 202, 203 (1960) (dicta); *Union Pac. R.R. Co. v. Bay Area Shippers Consolidating Ass'n, Inc.*, 594 F.2d 1291, 1294 (9th Cir. 1979) (per curiam); *Chicago Rock Island & Pac. R.R. Co. v. Furniture Forwarders, Inc.*, 420 F.2d 385, 386-89 (8th Cir. 1970); *Indiana Harbor Belt R.R. Co. v. Industrial Scrap Corp.*, 672 F. Supp. 1041, 1042 (N.D. Ill. 1986);

Port of Bandon v. Oliver J. Olson & Co., 175 F. Supp. 736, 741-42 (D. Ore. 1959) (referring case to United States Maritime Board.) In such cases, the shipper may "ask for a stay of the court proceedings and then ask the Commission to declare the [higher rate] . . . unreasonable." *Western Transp.*, 682 F.2d at 1231; *cf. Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 223 (1966) (Shipping Act); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act".) This legal regime tends (1) to prevent carriers from favoring particular shippers by charging a lower-than-filed-tariff rate, (2) to protect shippers from having to pay a higher-than-reasonable rate, and (3) to permit the relevant expert body, the ICC, to make the relevant expert determination.

This Court has consistently held that where the reasonableness of a rate is raised, that issue should be referred to the ICC. If the rates are found to be unreasonable or found to be unlawful for some other reason, the shipper should not have to pay them. Upholding the Fourth Circuit means the demise of the rate reasonableness defense.[2] If disputed monies have to be paid first

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[2] See "High Court Grants Cert," *Traffic World* 18 (May 25, 1992), stating: "A ruling favoring Carolina would effectively

(Continued on following page)

when they will be unavailable for recovery, the shipper's affirmative defense means nothing.

Thus the decision of the court below is in direct conflict with the decision of this Court in *Maislin*, and is inconsistent with other rulings of this Court as well.

B. The Decision of the Fourth Circuit is in Conflict with All Other Courts of Appeal that Have Addressed This Subject.

The following Circuits permit referral, without the requirement that the undercharges be first paid:

1. *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990);

2. *Duffy v. BMC Indus., Inc.*, 938 F.2d 353 (2d Cir. 1991);

3. *Advance United Exp. v. Eastman Kodak Co.*, No. 91-1320, slip op. (5th Cir., June 26, 1992).

4. *Orr v. ICC*, 912 F.2d 119 (6th Cir. 1990)

5. *Orscheln Bros. Truck Lines, Inc. v. Zenith Elec. Corp.*, 899 F.2d 642 (7th Cir. 1990); also *Western Trans. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982);

(Continued from previous page)

remove rate reasonableness as a viable defense in an undercharge case, said Joseph Steinfield, a Washington, D.C. attorney" [and attorney for Respondents]. "While in *Maislin* the bankruptcy trustees were at the edge of the cliff, now it is the shippers who are at the edge of the cliff," he said. "If they lose, their major defense is taken away from them."

6. *Atlantis Exp., Inc. v. Standard Transp. Serv.*, 955 F.2d 529 (8th Cir. 1992); and

7. *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990).

8. *Mill Truck Lines, Inc. v. Makita U.S.A.*, No. 91-55059 (9th Cir., June 7, 1992).

C. The Fifth Circuit Ruling that the Fourth Circuit Relied Upon Has Now Been Overruled.

The majority of the Panel said:

> In adopting this position, we join the Fifth Circuit, which has determined that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d at 392; see also *Southern Pacific Transp. Co. v. San Antonio, Texas*, 748 F.2d at 274. We note that such a rule in no way forecloses the shipper from raising the issue of the reasonableness of the tariff rates. This issue could be raised either before or after the filing of the undercharge suit and could result in a reparations payment to the shipper by the carrier. See 49 U.S.C. § 10708(a)(1); *Regular Common Carrier Conference*, 793 F.2d at 379. In the meantime, however, the tariff as filed will have been enforced. While we recognize the judicial opinion on this point is not unanimous, *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); see also *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982), we believe that the rule we adopt

> today best accords with the Supreme Court's longstanding insistence that "strict adherence to the filed rate . . . , despite its harsh consequences in some cases, is necessary to enforcement of the Act". *Maislin*, 497 U.S. at ___, 110 S.Ct. at 2769; see *Southern Pac. Transp. Co. v. Commercial Metals*, 456 U.S. 336, 343-44, 102 S.Ct. 1815, 1820-21, 72 L.Ed.2d 114 (1982); *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356, 361, 64 S.Ct. 128, 130-31, 88 L.Ed 96 (1943). And we add that we consider it of considerable importance that the filed rate doctrine has resulted in the prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in the past.

The Fifth Circuit in *Advance United Exp. v. Eastman Kodak Co.*, No. 91-1320, slip op. 11-14 (5th Cir., June 26, 1992) reversed its prior opinion in *Supreme Beef Processors v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), (also known as *In Re Caravan Express*) upon which the majority below relied, based on its analysis of this Court's *Maislin* decision (slip op. at 10). In doing so, the Court in *Advance United, supra* said:

> Having determined that Kodak was entitled to assert rate unreasonableness as a defense and that the applicable rate is yet to be determined, we are still confronted with the question of the appropriate forum for the determination of these issues. Kodak argues that the district court should have stayed the whole matter and referred the issues to the ICC. In the event the district court was not bound to refer the matter to the ICC, Kodak still seeks to stay enforcement of the district court's judgment until the ICC has

rendered its opinion on these issues that are now pending before it.

The general division of initial jurisdiction between the courts and the ICC is defined by the "primary jurisdiction doctrine, which requires that

> issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act" be submitted initially to the Commission for determination. Therefore, a district court trying a case under the Interstate Commerce Act *must*, if presented with such an issue, stay its proceedings and refer the case to the Commission."

City of New Orleans v. Southern Scrap Material, 704 F.2d 755, 758 (5th Cir. 1983) (emphasis added) *quoting ICC v. Atlantic Coast R.*, 383 U.S. 576, 579 (1966). Where the reasonableness of a tariff rate is at issue, the primary jurisdiction doctrine compels that "there *must* be preliminary resort to the Commission." *Southern Pacific Transport Co. v. City of San Antonio, Texas*, 748 F.2d 266, 272 (5th Cir. 1984) (emphasis added) *quoting Great Northern Ry. v. Merchants Elevator*, 259 U.S. 285, 291 (1922). Furthermore, when questions of construction and reasonableness of a tariff are "so intertwined that the same factors are determinative of both issues, then it is the Commission which *must* first pass on them." *Coca-Cola Co. v. Atchison, T. & S. F. Ry. Co.*, 608 F.2d 213, 220 (5th Cir. 1989) (emphasis added) *quoting U.S. v. Western Pac. R.R.*, 352 U.S. 59 (1956).

> Clearly, the primary jurisdiction doctrine mandates that the defense of unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision. Upon return of the referred issues from the ICC, the district court should then accord appropriate review. *See Coca-Cola v. Atchison, Topeka and Santa Fe. R. Co.*, 608 F.2d 213, 218 (5th Cir. 1979); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-617 [sic] (1966).

Since the Fourth Circuit relies so heavily on the reasoning contained in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), cert. denied 493 U.S. 803, the reversal by the Fifth Circuit leaves the Fourth Circuit decision completely unsupported and hopelessly irreconcilable with the positions of all other Courts of Appeal that have addressed this subject.

D. The Dissent in Case Below Correctly Expressed the Law.

As noted in Judge Hall's dissent:

> The majority finds, I agree, that the three appellant-shippers have preserved the issue of rate reasonableness. The question remaining after *Maislin* is whether the shippers should be allowed to dispute the reasonableness of the rates in the context of the undercharge action, or whether their sole recourse should be an independent reparations action under 49 U.S.C. § 11705(b)(3). For a variety of reasons, I believe the former path is correct.
>
> I believe the sounder position is set forth in *Delta Traffic Service v. Transtop, Inc.*, 902 F.2d at

101, 104-107 (1st Cir. 1990). In addition to demolishing the legal basis for the non-referral rule adopted by the Fifth Circuit in *Supreme Beef Processors*, the First Circuit explains the historical basis for the referral and stay rule which it believed was "universally accepted" until *Supreme Beef Processors* was discovered. *Id.* at 105. to the First Circuit's analysis I can only add the names of other post-*Maislin* decisions that have followed the referral and stay rule. *Duffy v. BMC Industries*, 938 F.2d 353 (2nd Cir. 1991); *Horn's Motor Express v. Harrisburg Paper Co.*, 765 F.Supp. 211 (M.D.Pa 1991); *Overland Express v. International Multifoods*, 765 F.Supp. 1386 (S.D.Ind. 1990); *Oneida Freight v. Ormon Shops*, 126 B.R. 431 (D.N.J. 1991); *In re Sharm Express, Inc.*, 122 B.R. 999 (D.Minn. 1991).

(Footnotes omitted.)

E. The Procedure Mandated by the Court of Appeals "Stands the Matter on its Head."

The Fourth Circuit maintains that a shipper's only remedy is to pay the undercharges and to assail the reasonableness of the rates by an action for reparations, pursuant to 49 U.S.C. § 11705(b)(3). But, such a course could leave a shipper with no remedy at all. First, the ICC has no independent reparation authority in motor carrier cases; an action first must be initiated in court, but, with a bankrupt carrier any such suit will be barred by the Bankruptcy Court's automatic stay order. Further, many times any action for reparations would be barred by the two-year statute of limitations, 49 U.S.C. § 11706(c)(2). *Mammoth Plastics v. National Classification Bd.*, 341 I.C.C.

15, 17-18 (1972); *Informal Procedure for Determining Reparations*, 335 I.C.C. 403, 413 (1969).

The ICC foresaw the procedural trap set out for shippers in *Glama Dress Co. v. Mid-South Transports*, 335 I.C.C. 586 (1969), a proceeding stemming from a carrier's action for undercharges. The ICC, 355 I.C.C. at 589, explained:

> As indicated, complainant here has filed a counterclaim in the pending court action raising issues of the reasonableness and lawfulness of the rates. Defendants take the position that the [statute of limitations] does not permit shippers to "assert unreasonableness as a defense in carrier suits to recover applicable tariff rates." Under this interpretation of the involved statutory provisions a shipper who has paid what it considers the proper rate or charge would be foreclosed from a possibly meritorious defense in a court action anytime the carrier sues for undercharges after the 2-year period specified in [49 U.S.C. § 11706(c)(2)] has run before the 3-year period specified in [49 U.S.C. § 11706(a)] . . . We believe that the same rationale [enunciated in *United States v. Western Pac. R. Co.*, 352 U.S. 59, 72 (1956)] should be applied here and conclude that the Commission has authority upon complaint of a shipper to make an administrative determination of the past unreasonableness and lawfulness of the rates sought to be charged on the shipments which are the subject of the pending court action.

More recently the ICC recognized that only by allowing Petitioners to assert the rate reasonableness defense to Respondents undercharge claims before payment are

Petitioners able to secure from the ICC a meaningful determination of the reasonableness of the rates as applied to their shipments. *Ex Parte No. MC-177 (Sub-No. 2) Petitions for Issuance for Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61 ("*Rate Reasonableness Statement*").

The dissenting opinion in *In re Carolina Motor Exp. Inc.*, 949 F.2d at 113 n.3 confirms the argument as to why the Fourth Circuit's procedure is convoluted:

> I believe this stands the matter on its head. It is the bankruptcy trustee who is making a claim against the shipper; the shipper, in turn, has asserted the defense of "unreasonable rate." If the shipper is correct, the filed rate is "not enforceable," *Id.*, and the trustee should receive nothing more than the unpaid portion of the reasonable rate. The majority, however, would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate. After this rate is paid, the shipper is left with a claim against the estate; even if the court estimates the value of this claim as the full difference between the negotiated rate and the filed rate, the shipper can only receive a pro rata share with the other unsecured creditors, an amount likely to be substantially less than the "claim" itself.

This approach is far more practical and promotes judicial economy while at the same time assuring a just result.

Moreover, as ploys to collect additional sums from shippers multiply, the courts need the benefits of the

ICC's expertise concerning the reasonableness and lawfulness of the charges sought to be collected before shippers are required to make payment. For example, the trustees and agents of the defunct motor carriers have been instituting actions all over the country to collect amounts equal to or, in some instances, greater than the *filed* rate originally billed and paid on the asserted ground that the originally billed filed rate is now considered by the collection agent to have been unlawful.[3] Courts at various levels have declined to refer such issues to the ICC sometimes even in the face of a request for referral by the ICC itself based on the holding of the majority of the panel of the court below. See *Lloyd T. Whitaker, Chapter 7 Trustee for Olympia Holding Corp. v. Younkers, Inc.*, U.S. Bkr. Court for the Middle District of Florida, Adv. No. 91-448, decision denying referral dated June 15, 1992. (See attached Addendum "A").

In the *Rate Reasonableness Statement*, the ICC discussed the criteria it traditionally used for determining the reasonableness of rates. The ICC's *Rate Reasonableness Statement* was referred to with apparent approval by the court in requiring referral of a rate reasonableness issue in *Atlantis Exp., Inc. v. Standard Transp. Serv., Inc.*, 955 F.2d 529, 536 (8th Cir. 1992).

---

[3] The most frequently asserted ground is that the originally billed filed discount rate, which the ICC permitted to be filed and published by shipper code to further computerization, in their view now violates the filing and publication requirements of the Interstate Commerce Act. Of course, the ICC by the express terms of the Act, 49 U.S.C. § 10762(b)(1), is made the arbiter of filing and publication under the Act.

From the inception of their regulation, now more than a century ago, the rates of common carriers were required to be just and reasonable, and any unjust and unreasonable rate was declared to be unlawful. 49 U.S.C. § 10701(a). Although the reasonableness of a rate can be challenged in many ways, the rate's effect upon the movement of traffic certainly is a measure of its reasonableness. A rate too high to permit traffic to move is *per se* unreasonable. The theory was explained in Harper, *Transportation in America*, 2d ed. 176 (1982), as follows:

> "In pricing transportation services, there is an upper limit on how high the rate on a given segment of traffic can be. This ceiling is often referred to as the *value of service* to the user, meaning that there is a point beyond which the rate is too high for what the transportation service is worth to the user. The value of service is really a measure of the elasticity of demand for the service and, usually, as the rate is increased, the volume of traffic shipped decreases."

The ICC in *Passenger Fares, District of Columbia, Nearby Virginia*, 256 I.C.C. 769, 783 (1944), *mod.*, 280 I.C.C. 37 (1951), *aff'd sub nom., United States v. Capital Transit Co.*, 325 U.S. 357 (1945), noted, "It is elementary that value of service, ability to pay, or what the traffic will bear, are elements properly entering into the fixation of reasonable transportation charges."

The ICC applied the principle in *Penick & Ford v. Director General*, 80 I.C.C. 152 (1923), in which it found that the application of regular molasses rates to the movement of black-strap molasses was unreasonable, noting that "[t]he regular molasses rates are in many

instances too high to move blackstrap in commercial quantities." *Id.* at 156. The ICC concluded, "Though by no means the sole consideration, the rate level necessary to move a commodity is an element to be weighed in determining a reasonable rate thereon." *Id.*

Similarly, in *O.C. Field Gasoline Corp. v. Nevada N. Ry. Co.*, 258 I.C.C. 350, 353 (1944), the ICC observed, "The fact that the . . . rate charged impeded the freedom of movement tends to prove that it was unreasonable." And in *Southern Cement Rates*, 132 I.C.C. 427, 446 (1927), the ICC said, "[T]he circumstances that rates impede freedom of movement tends to show that they are unreasonable . . ." *See also Richmond Mica Corp. v. Atlantic Coast Line R. Co.*, 167 I.C.C. 647, 648 (1930).

Therefore, a threshold question is whether the rate sought to be collected in an undercharge action was the one that permitted the traffic to move. If it was too high to move significant amounts of traffic, it was presumptively unreasonable and, therefore, unlawful.

Whether the rates sought to be collected in this proceeding would ever have moved the traffic during the time these shipments moved or whether the rate was too high or what were the rates of competing carriers, *inter alia*, are unresolved issues of fact in this case. Therefore, the reasonableness of these rates must be determined by the ICC, under its criteria.

CONCLUSION

Petitioners should have the right to have their defense of the unreasonableness of the rates be re-referred to the ICC. Doing less simply eliminates a valid defense which this Court made clear in *Maislin*, among other decisions, that Petitioners are entitled to raise. Petitioners risk forfeiture of unlawful overcharges if they have to pay the disputed sums and then reassert them following an ICC determination of their unlawfullness, as unsecured creditors against the bankruptcy estate.

Accordingly, the Court should reverse the Fourth Circuit and, as suggested by Judge Hall, remand to the District Court with instructions to refer the proceeding to the ICC for determination of rate reasonableness and any other defenses within the ICC's primary jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION.

CASE NOS. 90-4195-BKC-3P7 and
90-4223-BKC-3P7
Jointly Administered

Adv. No. 91-448

In re

OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc., et al.

Debtors.

LLOYD T. WHITAKER AS
CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc.,

Plaintiff,

v.

YOUNKERS, INC., a Delaware
corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Upon the Findings of Fact and Conclusions of Law separately entered, it is

ORDERED:

Defendant's Motion for Referral to the Interstate Commerce Commission is denied.

DATED: June 15, 1992 in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

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IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION.

CASE NOS. 90-4195-BKC-3P7 and
90-4223-BKC-3P7
Jointly Administered

Adv. No. 91-448

In re

OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc., et al.

Debtors.

LLOYD T. WHITAKER AS
CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc.,

Plaintiff,

v.

YOUNKERS, INC., a Delaware
corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This adversary proceeding came to be heard upon the Motion of Defendant for Referral to the Interstate

Commerce Commission. A hearing was held on December 13, 1991. Upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

Debtor was both a motor common and motor contract carrier operating in interstate commerce pursuant to the authority of the Interstate Commerce Commission ("ICC").

Debtor filed tariffs with the ICC which provided for a Class 70 exception rate with a discount of 55-59% off of that Class 70 exception rate. Subsequent to the filing of such tariff rate, debtor filed tariff item 721 stating that any customer not paying its bill within 60 days of the date of the invoice would lose its class exception and its discount ("loss-of-discount tariff").

Debtor filed a chapter 11 petition on October 16, 1990. Lloyd T. Whitaker was appointed as chapter 11 trustee on December 26, 1990. The case was subsequently converted to chapter 7 on March 11, 1991, and Lloyd T. Whitaker was appointed the chapter 7 trustee.

Defendant, as shipper, and Debtor, as common carrier, did business together on a tariff basis for a substantial amount of time.

In late November and early December of 1990, a dispute arose between debtor and defendant. Defendant claimed approximately $14,000.00 against debtor for goods lost or damaged in shipment and withheld payment on the shipping bills.

Plaintiff conducted an audit of debtor's records and determined that the original amounts billed were not properly rated in accordance with the filed tariff. Accordingly, the plaintiff sent new bills to defendant which did not include the class exception or the discount and which were rerated at the full class rates. The rerated bills represented an increase in rates from the original bills of at least 65-69%. Plaintiff based the change on the loss-of-discount tariff. Defendant refused to pay the rerated bills.

On June 20, 1991, plaintiff filed this adversary proceeding seeking turnover of property and a money judgment for $31,516.48, based on the rerated bills. Defendant filed an answer raising the defenses of set-off and unreasonable rates and asked that the proceeding be referred to the ICC. With plaintiff's consent, defendant later filed an amended answer asserting further defenses, as well as a counterclaim for damages.

Defendant contends that 1) the tariff rates on which plaintiff relies are inapplicable to the shipments in question; 2) if the rates do apply, they are unreasonable and unlawful under 49 U.S.C. § 10701(a); 3) the tariff rules violate 49 U.S.C. 10761 and ICC regulations contained in 49 C.F.R. Part 1320; and 4) some sums sought by plaintiff were not demanded until after the requisite time periods of 49 C.F.R. parts 1320.2(e)(2) and (3), 1320.2(g)(2)(vi).

Plaintiff, on the other hand, argues that 1) this Court does not have jurisdiction under 28 U.S.C. § 1336(b) to make a referral to the ICC; 2) referral is not necessary because defendant must pay the filed rate and then seek reparations; 3) the loss-of-discount tariff does not violate

ICC credit regulations, and 4) violation of the credit regulations is not a defense to enforcement of filed tariff rates.

Thus, the Court must initially determine whether it has the authority under 28 U.S.C. § 1336 to refer any issue to the ICC. If the Court does have such power, the question arises as to whether the issues raised in this proceeding must be resolved by the administrative agency and if so, at what point in time must such a determination be made.

Conclusions of Law

A. Referral Power

Congress provided in 28 U.S.C. § 1334(b) that " . . . district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Under 28 U.S.C. § 157(a), the district court may provide that any or all cases or proceedings arising under title 11 shall be referred to the bankruptcy judges. The United States District Court for the Middle District of Florida has entered such a referral order. Rule 104, Local rules for the Middle District of Florida. Accordingly, this bankruptcy case and this adversary proceeding have been referred to this Court.

The district court's jurisdiction to refer issues to the ICC is embodied in 28 U.S.C. § 1336, which provides in relevant part:

> (a) Except as otherwise provided by Act by Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.
>
> (b) When a district court or the United states [sic] Claims Court refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

Under the district court's referral order, the bankruptcy court is sitting in the adversary proceeding as a unit of the district court. Thus, for purposes of 28 U.S.C. § 1336, "district court" includes the bankruptcy court. *Railway Labor Executives' Assn v. ICC*, 894 F.2d 915 (7th Cir.) *reh'g denied*, 908 F.2d 127 (7th Cir. 1990); *In re Total Transportation, Inc.*, 84 B.R. 590 (D.Minn. 1988). Accordingly, this Court has jurisdiction to refer the issues at hand to the ICC.

It should also be noted that although his brief argues to the contrary, plaintiff's counsel stated during the hearing that this Court has "the power to refer matters to any federal agency, including the ICC." (Transcript at page 9).

B. Primary Jurisdiction

The doctrine of primary jurisdiction serves to ensure that the courts provide administrative agencies charged with specific regulatory responsibilities the appropriate

opportunity to fulfill such duties. The United States Supreme Court explained the doctrine:

> "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .
>
> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western P. R. Co., 352 U.S. 59, 63-64 (1956) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). The Court then indicated that the doctrine was intended to promote uniformity and consistency, as well as provide expert and specialized knowledge when resolving administrative questions. *Id.*; *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

The issues in this proceeding primarily involve the validity of the loss-of-discount tariff and the reasonableness of the filed rate. In *Western P. R. Co.* the Court also indicated that where the issue merely involved construction of a tariff, courts could decide it as an issue "solely of law." *Western P. R. Co.*, 352 U.S. at 66. Thus, as long as discretion in technical matters requiring a knowledge of intricate facts is not being exercised, a court may decide the issues.

The Court of Appeals for the Seventh Circuit has held that " . . . courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness." *Interstate Commerce Com. v. All-American, Inc.*, 505 F.2d 1360, 1363 (7th Cir. 1974).

The defendant contends that the loss-of-discount tariff if unlawful because it does not comply with ICC credit regulations. Plaintiff argues that the credit regulations are irrelevant and that the loss-of-discount tariff is merely a condition precedent to participation in the discount programs. Accordingly, the issue involves either a violation of regulations or tariff interpretation, both of which are within the original jurisdiction of this Court.

The Supreme Court has indicated that jurisdiction to determine the reasonableness of rates is vested with the ICC: " 'The [Interstate Commerce] Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.' " *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ___, 110 S.Ct. 2759, 2767 (1990) (quoting *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932)). The question of the reasonableness of debtor's filed rates should be properly decided by the ICC.

Both the parties admit that the ICC is the expert body vested with the authority to resolve a legitimate issue of rate reasonableness. However, the parties differ on their assessment as to when such a determination is properly made.

C. Rate Reasonableness

Currently the Circuit Courts of Appeal are split on the issue of when the ICC should determine whether a filed rate is reasonable. The first, third, seventh, and eighth circuits adhere to the stay and refer approach. *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd*, 919 F.2d 134 (3rd Cir. 1990); *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982); *Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529 (8th Cir. 1992). Those circuits hold that the judicial proceeding must be stayed and the issue of rate reasonableness referred to the ICC for determination. In so holding the cases necessarily recognize rate reasonableness as a defense to a proceeding to collect the filed rate.

The fourth and fifth circuits, on the other hand, hold that rate reasonableness cannot be used as a defense. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989). The cases indicate that the shipper must pay the filed rate and then the exclusive remedy for recovering excess charges is through the statutory reparations action. At that time the ICC would determine the reasonableness of a given rate.

Neither the District Court for the Middle District of Florida nor the Court of Appeals for the Eleventh Circuit has spoken on this issue. This Court finds that the rationale behind the holdings in the fourth and fifth circuits is

more persuasive and, thus, holds that rate reasonable is not properly asserted as defense to collection of the filed rate.

Prior to the enactment of the Motor Carriers Act of 1935, common law recognized a shipper's right to restitution for unreasonable charges. *Arizona Grocery Company v. Atchison, T. & S. F. R. Company*, 284 U.S. 370 (1932); *Arkadelphia Milling Company v. St. Louis S. R. Co.*, 249 U.S. 134 (1919). Subsequent to such enactment, it was assumed that the savings clause, 49 U.S.C. § 316(j),[1] provided the basis for a continued right of restitution.

However, the United States Supreme Court subsequently held that the restitution remedy afforded shippers under common law had not survived. *T. I. M. E. Incorporated v. United States*, 359 U.S. 464 (1959). In holding that a shipper could not challenge the reasonableness of a rate in post-shipment litigation, the Court left shippers without any remedy when a filed rate was found to be unreasonable.

Congress recognized the problem and enacted 49 U.S.C. § 304a in 1965 in an effort to provide shippers with relief. Section 304a provided that shippers could recover overcharges by filing an action at law for "reparations" within a certain time period. The section specifically defined reparations as damages resulting from charges based on a tariff found to be unreasonable by the ICC. Section 304a has since had recodified as 49 U.S.C.

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[1] Section 316(j) provides: "Nothing in this section shall be held to extinguish any remedy or right of action; not inconsistent herewith."

§ 11705(b)(3) and 11706(c)(2), which read, in relevant part:

> § 11705. Rights and remedies of persons injured by certain carriers.
>
> (b)(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.
>
> § 11706. Limitation on actions by and against common carriers.
>
> (c)(2) A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

The statute, by its terms, provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts paid. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1085 (5th Cir. 1974); *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F.Supp. 89, 93 (S.D.N.Y. 1992) ("The very characterization of the remedy in the statute – 'reparations' – suggests a rule of pay first and sue later.").

Rejection of reasonableness as a defense may lead to a harsh result, but it is the result dictated by the terms of the statute. In addition, it serves to support the filed rate doctrine espoused by the United States Supreme Court:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The Supreme Court recently reiterated the importance of the filed rate doctrine in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ___, 110 S.Ct. 2759, 2766-67 (1990).

By refusing to allow the defendant to assert rate reasonableness as a defense, the Court not only adheres to the statutory scheme, but also protects the filed rate doctrine and its underlying policy of discouraging price discrimination.

D. Conclusion

This Court has the jurisdiction to refer the issues raised to the ICC, but concludes that such referral is inappropriate at this time. Although the ICC has primary jurisdiction over rate reasonableness questions and is the

proper body to make such determinations, rate reasonableness is not a defense to a proceeding to collect the filed rate. Defendant's sole remedy for excessive charges is through the statutory reparations action.

A separate order denying defendant's motion for referral to the ICC will be entered.

DATED: June 15, 1992 in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

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